In the New Mexico Court of Appeals

BILLY A. MERRIFIELD,

Plaintiff - Appellant,

vs

No. 32,422

BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANTA FE,

Defendant - Appellee.

BRIEF IN CHIEF

A Questioned
Certified to the New Mexico Court of Appeals
by the Hon. Raymond Z. Ortiz,
Chief District Court Judge
First Judicial District Court
County of Santa Fe

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TRANSCRIPT OF PROCEEDINGS

The parties agreed that no transcript of proceedings is necessary since this case is purely legal argument based on the record.

SUMMARY OF PROCEEDINGS

This action was filed in action was filed in district court on 9/28/11 seeking a writ of certiorari to review the County of Santa Fe's (County) decision to terminate Billy Merrifield. (RP 1). The procedural history involves both state and federal courts.

On 7/19/2007, hearing officer Sarah Singleton issued her decision, upholding the termination of Merrifield. (RP 2, 6-25). In her decision, the hearing officer wrote that if she were making the decision *ab initio* and reviewing the discipline *de novo*, she would not have terminated Merrifield, but instead suspended him without pay for five weeks and demoted him to a non supervisory position. (RP 267 at n. 2) The hearing officer's decision was timely appealed to state district court within 30 days. (RP 2 at ¶ 6). Merrifield then voluntarily dismissed the state court case and timely re-filed the matter in federal court pursuant to NMSA 1978, § 37-1-14. (RP 2 at ¶ 6). The County sought to dismiss the claim in federal court; however, Judge Smith denied that motion. (RP 230 at 238-39).

On 12/31/2008, the United States District Court reversed the hearing

officer's decision on the basis that the hearing officer should have reviewed the County's decision *de novo* and further held the hearing officer should not have not applied a differential standard of review. (RP 26-38). The federal district court awarded and entered judgement in favour of Merrifield in the amount of $30,866.50. (RP 39-42). The federal district court had previously addressed Merrifield's remaining civil rights claims and dismissed them. Both sides appealed to the Tenth Circuit Court of Appeals. The United States Tenth Circuit Court of Appeals rejected Merrifield's appeals and reversed the federal district court, holding that the federal court should have not reached the state law claim and should have dismissed the state claim without prejudice. (RP 2 at ¶ 10, 45-71). A writ of certiorari was sought to the United States Supreme Court. The United States Supreme Court denied the writ of certiorari. Merrifield v. Bd of County Commissioners for County of Santa Fe, – U.S. —, 132 S.Ct. 1991 (2012). The Tenth Circuit issues its mandate letter to the federal district court on 8/29/11. (RP. 224). On 8/31/11, the federal district court then issues its final order dismissing Merrifield's state law claims without prejudice. (RP. 73-76). This petition for writ of certiorari was filed on 9/28/11 within 30 days of the federal court's dismissal. (RP 1, 225-227).

On 11/18/2011, Merrifield filed his request to certify a question to the

New Mexico Court of Appeals. (RP 115). The question requested to be certified pertained to the standard of review a hearing officer should use in reviewing a governmental agency's decision to terminate an employee — *de novo* or differential to management. On 12/13/2011, the County filed a motion to dismiss, contending that this petition for writ of certiorari was untimely filed. (RP at 139, 140). The state district court denied the motion to dismiss on 8/6/2012 (RP 295) but granted the motion to certify the question to the New Mexico Court of Appeals on 9/21/2012 (RP at 305). This Court accepted the question and assigned the matter to the General Calendar on 10/18/2012.

QUESTION CERTIFIED

The trial court certified the following question pursuant to NMSA 1978, § 39-3-1.1(F):

> "If the standard of review is not specified in the ordinance or policy, what is the the appropriate standard of review that a hearing officer is to follow in a public employee termination hearing of the public employer's decision: Is the hearing officer to review the evidence and discipline *de novo* without deference to the public employer's decision? Or, is the hearing officer to give deference to the public employer's decision on

the evideence and the disciplinary sanction and review the public employer's deicsion for whether it is supported by substantial evidence, is arbitrary and caprious, or contrary to law?"

ARGUMENT

Standard of Review:

Certified questions of law are reviewed *de novo*. Pinghua Zhao v. Montoya, 2012-NMCA-056, ¶ 8, 280 P.3d 918, cert. granted, 2012-NMCERT-005.

Summary of Argument:

The New Mexico Constitution's due process clause requires that to have a fair and impartial hearing, the hearing officer is vested with the constitutional obligation to review the matter a fresh and render an independent decision based on the evidence heard and to determine what discipline, if any, is warranted independently of the government employer's assessment. N.M. CONST. Art. II, § 18.

Impact of Decision:

According to 2011 Annual Survey of Public Employment and Payroll for New Mexico for state governments as reported by the U.S. Census Bureau, there are 41,240 full time public employees and 13,776 part time

public employees in New Mexico. www2.census.gov/govs/apes/11stnm.txt. In addition to state employees, the U.S. Census reports there are 72,852 full time and 16,838 part time local government employees. www2.census.gov/govs/apes/11locnm.txt. While not all of these government employees have vested property rights to their jobs, a vast number would be impacted by this Court's decision on the question presented.

Statement of First Impression:

The question presented is of first impression in New Mexico. While there are no reported cases on point, New Mexico's jurisprudence on interpreting Article II, Section 18 of the New Mexico Constitution supports the proposition that the administrative hearing officer is supposed to be not only impartial and detached but also act as independent decisionmaker when sitting in judgement on whether the termination was justified.

Background on Disciplinary Process.

To understand the process, a brief general background of the disciplinary process may be helpful to this Court. The employee's supervisor initiates the disciplinary process. After the supervisor initiates discipline, it may be reviewed by the department's human resources department for review and comment. A notice of contemplated action

(NCA) is prepared. The NCA informs the employee of the work performance deficiency or unacceptable conduct, setting forth the factual basis, identifying documentation, and citing rules or procedures of the department. The department head or final decisionmaker typically signs off of the NCA. The employee is then given an opportunity to respond to the NCA either orally or in writing. This response is typically addressed to the person who signed off on the NCA. Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 781, 907 P.2d 182, 185 (1995)(The pre-termination hearing is for the purpose of determining whether there were reasonable grounds to sustain the charges supporting the proposed adverse action). With that information, the final decisionmaker renders a decision. If the decision is adverse, then the employee may appeal to a hearing officer who conducts an evidentiary administrative hearing. The hearing officer renders the decision. In some instances, this may be a "recommended decision" and in other instances it is a final decision. In the recommended scenario, the decision is then reviewed by the department's board or governing body acting in a *quasi* judicial capacity and that board or governing body issues a final decision. The administrative final decision is then subject to judicial review: whether the decision is supported by substantial evidence, whether the decision is arbitrary or capricious, or

whether the decision is erroneous as a matter of law.

The County of Santa Fe's administrative process is very similar but there are some minor differences. Under the County's policies (RP 272-78) the supervisor initiates the disciplinary action and proposes the discipline. (RP 272 at § 8.2(A)). The employee has the right to a pre-disciplinary hearing before the Human Resources Director. (RP 272 at § 8.2(B-C)). The Human Resources Director issues a decision. (RP 272 at § 8.2(D)). The employee then may appeal that decision to the County Manager. (RP 272 at § 8.2 (E)). The County Manager reviews the prior written submissions issues a decision. (RP 272 at § 8.2(F)). The employee then may appeal the County Manager's decision to be heard by an arbitrator (hearing officer) who is hand picked by the County Manager, unless there is a showing for cause to disqualify that individual. (RP 273 at §8.3 (A-C)). The hearing officer conducts pre hearing conferences, issues pre trial orders, issues subpoenas, addresses discovery matters, conducts an evidentiary hearing, rules on the admissibility of the evidence, and issues findings of fact and conclusions of law. (RP 274-75). There is nothing in the County's policies explicitly stating the standard of review the hearing officer is to conduct the hearing, view the evidence, or impose discipline, if warranted.

Merit's Argument:

Under the New Mexico Constitution, the judicial power of this State is vested in our court system. N.M. CONST. Art VI, § 1. This is our present constitution, passed in 1965. Past constitutional provisions are substantially similar. E.g., N.M. CONST. Art. V, § 1 (1850); N.M. Const. Art. VI, § 1 (1910).

In 1957, the New Mexico Supreme Court in State ex rel Hovey Concrete Products Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957) held the Workmen's Compensation Act, 1957 N.M. Laws ch. 246, unconstitutional on the basis that it was unlawful delegation of judicial power. The Supreme Court was careful in noting that our Legislature, under its police powers, may nonetheless create "*quasi* judicial" administrative boards for the protection of the general public. The adjudicating individual rights transgresses the separation of powers clause and hence any act delegating that authority would be unconstitutional.

The Mechem decision was subsequently overruled in New Mexico until Wylie Corp. v. Mowrer, 104 N.M. 751, 726 1381 (1986). There, the Supreme Court allowed for an administrative body to determine individual rights under the Legislature's police powers. The Wylie court reasoned that public policy and a long history of administrative law renders the logic

behind Mechem not valid. Implicit in this reasoning is that the decisionmaker in the administrative law system shall carry out his or her duties and responsibilities in a fair and impartial manner in conformance with due process. As long as the administrative procedures are sufficient to guarantee a fair proceeding, there is no due process violation. Ferguson-Steere Motor Co. v. State Corp. Comm'n, 63 N.M. 137, 143, 314 P.2d 894, 898 (1957) ("Hearings before administrative bodies need not be conducted generally with the formality of court hearings or trial, but the procedure before such bodies must be consistent with the essentials of a fair trial."). Likewise, New Mexico's constitutional right to access to courts is not transgressed when the hearing comports with minimum due process standards. Board of Educ. of Carlsbad Mun. Schools v. Harrell, 118 N.M. 470, 882 P.2d 511 (1994).

Due process mandates an impartial decisionmaker. New Mexico Bd. of Veterinary Medicine v. Riegger, 2007-NMSC-044, ¶ 27,142 N.M. 248, 164 P.3d 947 (due process requires a fair and impartial decisionmaker, free from any form of bias or predisposition)(citation omitted). Where the decisionmaker has already made up his or her mind prior to taking the evidence and conducting the hearing, this constitutes a due process violation. State v. Pacheco, 85 N.M. 778, 780, 517 P.2d 1304, 1306

(1973) ("However, when the trial court has already made arrangements, prior to the hearing, with the deputy warden for defendant's care (defendant being paralyzed from the waist down and in a wheelchair) we can only conclude that the trial court prejudged the hearing, thereby depriving defendant of his fundamental right of a fair hearing before an impartial tribunal."). Thus, due process further mandates that the decisionmaker be neutral and detached. Los Chavez Community Ass'n. v. Valencia County, 2012-NMCA-044, ¶ 23, 277 P.3d 475 (requirement of impartiality applies to all who serve as "adjudicators"); State v. Orquiz, 2003-NMCA-089, ¶16, 134 N.M. 157, 74 P.3d 91 ("The right to be heard by a neutral and detached hearing officer is among the minimum due process requirements of a revocation hearing."). As the Reigger court pointed out, actual bias or prejudice is not required. If there is any indication, temptation or appearance of impropriety to an average person that would suggest the proceedings would not be fair and free from bias, then the constitutional protection of procedural due process has been violated. These fundamental principles apply to administrative proceedings. Reid v New Mexico Bd of Examiners of Optometry, 92 N.M. 414, 589 P.2d 198 (1979). *Quasi* judicial decisionmakers are bound by the same ethical standards as judges. Los Chavez Community Assn' v. Valencia, 2012-

NMCA-044, ¶24.

The Reid court held that any system purporting to dispense justice must be totally fair and free from any appearance of bias or prejudice. 92 N.M. at 416, 589 P.2d 200. Our Supreme Court went on to say:

> These principles apply to administrative proceedings as well as to trials. When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, *it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.* The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed.

Id. 589 P.2d at 200 (citations omitted)(emphasis supplied).

Reid makes three points: First, the principles of due process extend to administrative proceedings. Second, there is an heightened state of awareness of due process because many of the "customary safeguards affiliated with court proceedings" are relaxed to further expedite resolution. And finally, the process must be akin to our court system. It is this later provision which lends support to the notion that the hearing officer must be independent and review the matter in its entirety *de novo*. State v Pacheco. Another component in due process arises out of Cleveland Bd of Educ. v. Loudermill, 470 U.S. 532 (1985). Loudermill holds that once

there is a property right in job[1], an employee is entitled to reasonable notice of the charges and be given an opportunity to be heard, actually respond, to the allegations. This opportunity to respond to the charges is not a hearing but rather an opportunity to tell the employer why the decision is erroneous or the punishment is inappropriate. See Franco v Carlsbad Municipal Schools, 2001-NMCA-042, ¶ 16, 130 N.M. 543, 28 P.3d 531. Because it is no more than a preliminary check against a clearly erroneous decision, a detached and impartial decisionmaker is not required. West v. San Jon Bd. of Educ. 2003-NMCA-130, ¶11, 134 N.M. 498, 79 P.3d 842, cert. denied, 2003-NMCERT-2, 134 N.M. 723, 82 P.3d 533. The neutral and detached decisionmaker comes into play at full evidentiary hearing. Bd of Educ. of Carlsbad Mun. Sch. v. Harrell, 118 N.M. 477-78, 882 at 518-19; Matter of Termination of Boespflug, 114 N.M. 771, 774, 845 P.2d 865, 868 (Ct. App. 1992) ("Post-termination, petitioner was afforded a full evidentiary hearing in which he was able to testify at length about his own conduct and any possible extenuating circumstances."). "Although an administrative body is not required to follow the formal rules of evidence, adjudicatory proceedings which involve substantial rights are bound by the fundamental principles of justice and

[1]There is no issue that Mr Merrifield was a classified employee at the County. (RP 118, 123).

procedural due process." Id. at 774, 845 P.2d at 868 (citations omitted).

The concepts of "fairness" and "impartiality" (a detached decisionmaker) require that the hearing officer sit independently and hear the evidence afresh. "Actions to terminate constitutionally protected rights must be conducted with scrupulous fairness." Franco v. Carlsbad Municipal Schools, 2001-NMCA-042, ¶ 20, (citation omitted). Listening to the evidence, evaluating the evidence, and rendering a decision all suggest that the hearing officer reviews the matter *de novo* and independently of prior public employer's decision. "A reasonable and impartial mind is one which hears before it condemns, which proceeds on inquiry, and only renders a decision after hearing all of the evidence." State v Pacheco, 85 N.M. at 780, 571 P.2d at 1306. To suggest that the fair hearing is to give deference to public employer's decision basically denies the employee a meaningful opportunity to be heard before a detached and fair decisionmaker.

There are notable differences between the public and private sector when it comes to termination of employees. In the private sector and where the employee is not "at will" and is not involved in protected conduct,[2] contract principles apply. Kestenbaum v. Pennzoil Co., 108 N.M.

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[2]*E.g.*, NMSA 1978, §28-1-1, *et seq.* (Human Rights Act), NMSA 1978, § 50-9-25 (OSHA, retaliation)

20, 766 P.2d 280 (1988). Kastenbaum does not require the private employer to hold a hearing prior to termination. Rather, Kastenbaum holds that if the private employer had good faith belief based on the evidence it had before it to uphold the termination, the termination must be upheld. This is different from the public sector where public employees who have property rights to their job are entitled to due process — the right to a neutral and detached hearing officer. In the private sector, there is no requirement that the decisionmaker be detached and neutral but only that the decision be made in "good faith".

The underpinning of a public sector personnel system further supports the view that the hearing officers render independent decisions. The public sector disciplinary process in the United States owes its origination from the assassination of President Garfield by a disillusioned federal job seeker. Garrity, A HISTORY OF THE UNITED STATES: THE AMERICAN NATION 692 (2d ed. 1971). Historically, government jobs were handed out under the spoils system – owing its popularity to President Andrew Jackson. Id at 316 In reaction to President Garfield's assassination and in 1883, Congress passed the Pedleton Act, 22 Stat. 403. This Act classified 10% of all federal workforce on a merit selection system.

In New Mexico, it appears that our first civil service law was passed in 1961. 1961 N.M. Laws ch. 240. The purpose of that original act was to "establish ... a personnel [system] based solely on qualification and ability, which will promote greater efficiency in the management of state affairs. NMSA 1953, § 5-4-29. The Attorney General opined that the Legislative purpose of the act was to "insulate in some manner the paid state employee from the whims and caprice of the political election..." N.M. Atty Gen. Op. 64-7 at 414-15 (1/23/1964). The Attorney General Opinion expressed that the aim of the Legislature was to implement a system of merit, based on objective examinations to select the best qualified candidate suited for the position. Therefore, the system was devised not only to rid the system of politics but also to further a system of merit. One element of a system of merit is that employees who have obtained classified or non probationary status are not terminated whimsically, in retaliation for a personal vedetta, or treated unfairly by management. That is why an independent and detached hearing officer is constitutionally required.

Under the state civil service system, hearing officers were established to hear the evidence. The hearing officers looked at management's decision afresh and reviewed the evidence *de novo* and

reached their own decision. E.g., Sais v. New Mexico Dept. of Corrections, 2012-NMSC-009, ¶ 19 , 275 P.3d 104 (affirming Personnel Board's decision of the evidence and law); Selmeczki v. N.M. Dept of Corrections, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158 (affirming Personnel's Board's decision because it was not arbitrary, capricious, was supported by substantial evidence, and was not contrary to law); Gallegos v. N.M. State Corrs. Dep't, 115 N.M. 787, 802, 858 P.2d 1276, 1281 (Ct. App. 1982) (Personnel Act requires the board to determine that the employee engaged in misconduct and the appropriate discipline in light of the employee's misconduct).

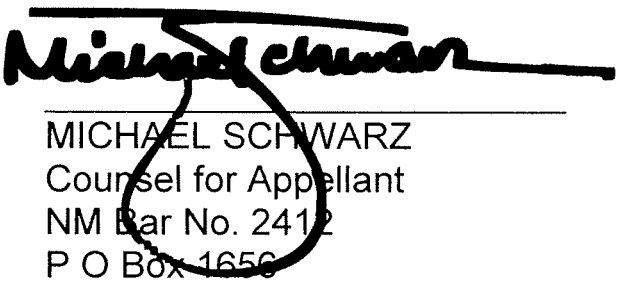
To hold that hearing officers must view the public employer's decision deferentially undermines due process. If due process requires a neutral and detached decisionmaker coterminous with that is the decisionmaker renders his or her own decision based on the evidence adduced at the hearing. This is not a question of deference. It is a question of fundamental fairness and independence to ensure that justice is done.

CONCLUSION

In conclusion, under the New Mexico Constitution, Article II, § 18 and the public policy of this State, a classified public employee is entitled to an impartial, detached, and neutral hearing officer who views the evidence *de*

novo and arrives at his or her decision on what discipline, if any, should be imposed. This Court should rule that hearing officer exercises independent judgement in assessing the evidence and determining what discipline, if any, should be imposed.

Respectfully submitted



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CERTIFICATE OF SERVICE

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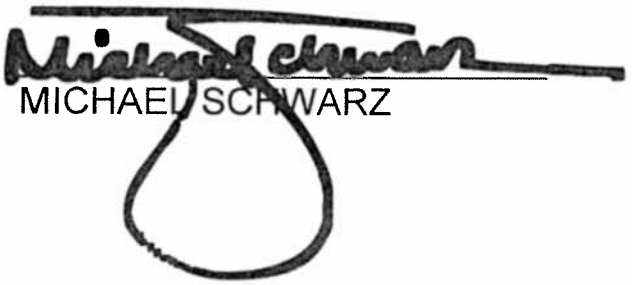

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